No. 3089

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED VERDE COPPER COMPANY,
A Corporation,

Appellant,

vs.

NICK KUCHAN,

Appellee.

Brief of Appellant

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STATEMENT OF CASE.

The appellee, Nick Kuchan, is a native of Austria, and at the time of his injury was thirty-four years of age, and an experienced miner. He commenced work for the appellant at Jerome, Yavapai County, Arizona, on September 21, 1914.

On the 19th day of March, 1916, he went to work at seven o'clock in the evening in appellant's mine. He was timbering on the 700 foot level at what is known as the 6—1 stope. Some eight or nine other miners were working in the same locality. At eleven o'clock p. m., which was the customary lunch hour, blasting was to occur at this part of the mine, making it necessary for the appellee and the other miners to leave. Usually they ate their lunch at the old station on the 700 foot level. There was a possibility, however, that the smoke and gas from the blasting in that vicinity would make their customary lunching place untenable, so they decided to go somewhere else.

While the miners were in the old station there was

some discussion among them as to where to go to eat, but appellee and some half dozen others decided to go to the 800 raise because they had lunched there a few times before.

The position they sought to reach was some 300 or 400 feet in a westerly direction. There was another direction which would take them away from the gas and smoke of the 6—1 stope open to them from the old station, but they chose the 800 raise. They walked through a tunnel 6 feet high and 6 feet wide, going in a westerly direction. Mike Dragich led the way, appellee Kuchan second, and the others followed. They came upon a muck pile, and it was at this point that the explosion which injured appellee occurred.

Appellee's injuries sustained from the explosion are the loss of both eyes, total loss of hearing in one ear, and a slight impairment in the other, some destruction of the molar bones of the cheek, and some wounds on the left shoulder.

Martin Lazar, an employee of the appellant company, drilled the hole and placed the shot that caused the explosion which resulted in the appellee's injuries. The explosion occurred at about eleven p. m., which was the usual blasting time throughout the mine, a fact which was common knowledge to all of the miners. Lazar was instructed by his shift boss to give warning. He dispatched some workmen in one direction to warn, instructed one Kotch to go in another direction, and he himself went in a third. Witness Mike Dragich, who walked just ahead of the appellee, knew that Lazar was

drilling in that part of the mine and knew that he would blast in the vicinity of eleven p. m., the blasting hour, but he did not inform appellee, who did not have that knowledge, although he—the appellee—also knew that this was the blasting hour throughout the mine. Nothing connected with his employment called the appellee to the place where the blast occurred, and he was not compelled to pass in that direction to discharge his duties.

In his charge to the Jury the Court made the following instruction:

> "You are instructed that the law requires a Mining Company, such as the defendant, before firing charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon Mining Companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant, and if you find from the evidence that warning of the intention to fire the charge of explosives which caused the injury to the plaintiff was not given and that the failure to give such warning constituted the approximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in such action."
>
> (Trans. of Rec. pg. 75, folio 58.)

The Jury returned a verdict in favor of the appellee in the amount of $25,000.00.

ASSIGNMENT OF ERROR RELIED UPON.

I.

The error relied upon by appellant in this case is based upon the following instruction:

> "You are instructed that the law requires a Min-

ing Company, such as the defendant, before firing charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon Mining Companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant, and if you find from the evidence that warning of the intention to fire the charge of explosives which caused the injury to plaintiff was not given, and that the failure to give such warning constituted the approximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in such action. (Transcript of record page 75, folio 58.) The giving of which instruction is assigned as error.

ARGUMENT AND AUTHORITIES.

The instruction complained of was based upon subdivision E of section 4071 of the Civil Code of Arizona, which reads as follows:

> "Before firing charges warning must be given in every direction from which access may be had to the place where blasting is going on, and misfire holes shall be reported to the mine foreman or the shift boss in charge of the locality of such holes. If the shots are fired by electricity, the place must be carefully examined before men are permitted to work therein. The miner in charge shall further instruct those employed in clearing away the loose rock to report to him immediately the finding of any wires in or under the loose rock, and in the event of such being discovered, he shall at once order the work to cease until the wires have been carefully traced to their terminals in order to determine whether a mis-fire has occurred."

We contend that in giving the instruction complained of the Learned Court did not correctly interpret the law as stated in subdivision E of section 4071,

and that the instruction was therefore highly prejudicial in plaintiff's favor, and in a measure was largely responsible for the verdict for the plaintiff.

The instruction reads, partly, as follows: "The law "*requires* a Mining Company, such as defendant, before "firing charges of explosives to give warning in every "direction from which access may be had to the place "where blasting is going on." Further on we find these words: "The failure to give warning *as required by* "*statute* constitutes negligence," etc.

The whole question on this appeal is whether subdivision E, section 4071, which is *the law* referred to, does actually place the duty of giving warning before firing a charge of explosives upon the Mining Company. It is our conviction that it does not; that it places no other duty upon the Mining Company than the ordinary duties which the employer must bear as laid down in the well-known laws of Master and Servant.

To begin with, there are no words in subdivision E of section 4071 which specifically designate the "Mining Company" as the person or company on whom the duty to give warning falls. "Mining Company," or a word or phase equivalent to or synonymous with it, is not in the paragraph. We cannot believe that this failure to use the said term or its equivalent was an accident, but rather we think it was a deliberate design on the part of the legislators who created the act. Throughout chapter 3 on "Mine Inspector and Operation of Mines," whenever a personal obligation is to be

imposed on the Mining Company, in almost every instance the Mining Company is mentioned specifically. The chapter is full of illustrations which show that the Legislature recognized that in some cases the duty must be fixed definitely on the company, apart from its servants, and that in other cases the duty must be made personal with the servant,—that is to say, an individual duty resting upon the servant as a man.

The two penal sections in the chapter illustrate this. Section 4066 is as follows:

> "4066. If any operator shall violate any of the provisions of sections 36, 37 or 38 (Pars. 4088. 4089 or 4090) of this chapter, he shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars and not to exceed five hundred dollars, or imprisonment in the county jail not to exceed one year, or both such fine and imprisonment."

Section 4091 reads as follows:

> "4091. Any person who violates any of the provisions of this chapter where other penalty is not expressly provided shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars or not more than three hundred dollars, or imprisonment in the county jail not less than thirty days or not to exceed one year, or both such fine and imprisonment."

In section 4066 the punishment is directed at the Mining Company. The Mining Company is especially singled out. In section 4091 the punishment is directed at "any person who violates any of the provisions of this chapter."

Penal section 4091 certainly recognizes that chapter 3 has laid down duties which are strictly personal to the workmen. We emphasize this now because it shall be our contention throughout this brief that the duty of giving warning imposed in section 4071-E was and is a personal and individual duty of the miner in charge of the operation, and that the failure to carry out this duty would subject the miner to criminal punishment, as provided by the statute. It was not and is not a duty imposed by law upon the Mining Company. Of course, we recognize that the rights and duties of the owner and its servants are closely allied; that the owner is under obligation to be reasonably careful in the selection and instruction of its servants, and is liable for the negligence of its servants acting within the scope of their authority. But we deny that the company is negligent as a matter of statutory law when a servant fails to perform a duty which is personal in its nature.

If the legislature had intended to place the duty in question on the Mining Company, we believe it would have so designated, as it did in many of the sections of the chapter. Section 4053 reads as follows: "The term "'operator' when used in this chapter shall mean the "person, firm, association, company or corporation in "immediate possession of any mine or mining claim, or "accessories thereof, as owner or lessee thereof, and as "such responsible for the management and condition "thereof."

In the following sections the duty is placed upon the operator, and the operator is named:

Section 4064, last line, "And the operator of said "mine shall obey such order;"

Section 4065, "Whenever loss of life or serious "accident shall occur in any mine within this State, "the owner, agent, manager or operator having charge "of operating such mine shall give notice immediately" etc.;

Section 4069, "It shall be the duty of the mine "operator, superintendent or anyone in charge of a "mine," etc.;

Section 4070, "When considered necessary by the "mine inspector and so ordered by him, the operator of "every mine employing ten or more men on the ground "shall," etc.;

Section 4071, in the middle of subdivision A, "Each "mine owner shall provide a suitable device for thaw- "ing or warming powder," etc.;

Section 4073, "It is hereby made the duty of every "person, company or corporation who shall have," etc.;

Section 4074, G, "It shall be unlawful for the oper- "ator of any any mine to permit hoisting or lowering of "men," etc.;

Section 4075, A, "The owners and operators of the "respective mines shall be responsible for the outlet, or "part of it," etc.;

Section 4078, D, "It shall not be lawful for any "operator to impound water," etc.

In the following sections the duty is of necessity placed upon an individual, who may be an officer of the company, the owner or any person employed by the

owner, and for violation of the sections penalty is attached which is covered by section 4091 quoted before:

Section 4071, C, reads as follows:

"No person shall, whether working for himself or in the employ of any person, company or corporation, while loading or charging a hole with any blasting powder or other high explosives, use or employ any steel or iron tamping bar; nor shall any mine manager, superintendent, foreman, shift boss, or other person having the management or direction of mine labor, allow or permit the use of such steel, iron or other metal tamping bar by employees under his management or direction."

Section 4074, K:

"No person shall ride upon any cage, skip or bucket that is loaded with tools, timber, powder or other material, except for the purpose of assisting in passing these through the shaft."

Section 4077, B:

"No candles shall be left burning in a mine, or any part of a mine, when the person using the candle departs from his work for the day."

Section 4083:

"No person shall knowingly injure or destroy a water gauge, barometer, air-course, brattice, or other equipment or machinery of any mine; nor, unless lawfully authorized so to do, obstruct or open an air-way, handle or disturb any part of the machinery of the hoisting engine of the mine, open the door of a mine and neglect to close it, endanger the mine or those working therein, disobey an order given in pursuance of law, or do a wilful act whereby the lives or health of persons working in such mine, or the security of a mine, or the machinery connected therewith, may be endangered."

Section 4084:

"Notices shall be placed by the superintendent or under his direction by the mine foreman or shift boss at the entrance of any working place deemed dangerous, and at the entrance to old or abandoned workings, and no person other than those authorized by the operator, manager or superintendent. shall remove or go beyond any caution board or danger signal so placed."

Section 4086, B:

"In mines where a station tender is employed no person shall ring any signal bell except the station tender, except in case of danger or when the main shaft is being sunk."

Section 4090:

"It shall be the duty of the superintendent of every mine within the provisions of this chapter to keep at all times in the office of said mine and in the timekeeper's office thereof, in an accessible place and subject to inspection by all workmen and persons interested in the same, at least one printed copy of this chapter."

It is our position that section 4071, E, makes the duty as personal to the individual doing or refraining from doing the act as any of the preceding sections mentioned. We shall discuss this more in detail later.

It may be argued that many sections do not mention the operator or mine owner by name, and yet the duty is so clearly upon the owner that any other construction would be absurd. That is true, but every such section concerns itself with the employment of men, equipment or devices to be used or provided for use in the mine. Sections in that category are the following: 4071-A , 4072-A-B-D-E-F-H-M-N-O-P-Q-S, 4075,

4076, 4077-A, 4078-C, 4079, 4080, 4081, 4082, 4085, 4086 and 4087. Section 4088 is especially provided for in penal section 4066.

It will be noted that because of the subject matter of the above sections, the servant, as a matter of course, is excluded from any duties. The sections concern themselves chiefly with tools, devices and equipment with which and in which the miner must work, and hence the duty is naturally solely upon the operator of the mine. The question as to whether or not the duty is imposed on the servant cannot arise.

We have discussed many of the sections of the chapter with a view towards finding the intent of the Legislature which created the act, and we believe we have established that whenever (except in cases where the duty of the owner was clearly apparent otherwise) the Legislature wished to fasten a duty specifically on the operator or owner, the operator or owner was named in the section as the one on whom the obligation fell. Let us now scrutinize section 4071, E, by itself.

To begin with, chapter 3 on "Mine Inspector and Operation of Mines" is penal in its nature, and as such should be construed strictly. This is axiomatic law. Therefore no great leeway should be allowed in placing individuals or companies under the scope of the section, unless the section can be reasonably read so as to include them.

Suppose this were an action in which the Mining Company was prosecuted criminally because warning had not been given before firing the charge. In that

case it would be very difficult, if the section were construed strictly, to find the company guilty. We urge that it could not be held to be within the meaning of the section unless one of the owners was actually on the spot in charge of the work, or the company was so grossly negligent in the choice and instruction of its servants that criminal intent on its part must be implied as a matter of law. If the company is not within the purview of the section in a criminal action, it could hardly be said in a civil action that the Mining Company was meant, although not named.

When the Legislature framed chapter 3 on "Mine Inspector and Operation of Mines," it may safely be asserted that the one immediate object it had in view was the passing of a law that would protect as far as possible the miners of the State from accidents in the mines. No doubt every section, paragraph and sentence was framed with that idea uppermost in mind, and the Legislators must have thought that to make the duty strictly personal with the miner engaged in blasting, and to penalize him if he failed in his duty, would be more effective in the procuring of the maximum safety for the miners than to place the duty on an intangible company, on whom the penalty would fall but lightly.

Section 4090 bears this out. That section makes it the duty of the superintendent of every mine to place a copy of chapter 3 in the office of the mine and in the timekeeper's office in an accessible place for the inspection of the *workmen*. It is our belief, and we strongly contend, that the Legislature, in enacting this section,

had chiefly in view the bringing home to the workmen themselves that the onus of care was not all on the owner, but that they had their own personal duties as miners which they owed to their fellow workmen, and that those duties were distinct from the duties of the Mining Company. One of the so-called personal duties most necessary to be continually called to the attention of the miner was the duty to warn before firing the blasting explosive.

A close analysis of section 4071, E, seems to bear out our view on the construction of the paragraph. Beginning in the middle of line 3, we find the following: "Mis-fire holes shall be reported to the mine foreman "or shift boss in charge of the locality of such holes." The words quoted certainly impose a duty, for the non-observance of which a penalty is provided in section 4091. Upon whom is that duty imposed? Certainly upon the workman on the job. It is a personal duty with him. It seems to us that it would be unreasonable to say that it was a duty of the Mining Company, for the non-observance of which it could be penalized and made guilty of negligence *per se*..

The next sentence imposes a duty to examine the place carefully before men are permited again to work there, if the shots are fired by electricity. We think the sentence following explains on whom that obligation falls. The sentence reads: "The miner in charge shall "*further* instruct those employed in clearing away the "loose rock to report to him immediately the finding of "any wires in or under the loose rock, and in the event

"of such being discovered he shall at once order the "work to cease until the wires have been carefully "traced to their terminals, in order to determine whether "a mis-fire has occurred." To us it seems that the use of the word "further" makes it possible to delve straight into the minds of the Legislators who wrote paragraph E and get their meaning as they intended to convey it. Why was the word "further" injected into the sentence? The word certainly implies that the miner in charge was under duty to give other and previous orders in the course of the blasting operation. And it seems reasonable to conclude from the striking use of the word that the Legislators had in mind that the miner in charge should instruct his co-workers on their duties relating to the blasting operation from its start to its finish, and that therefore the duty was on the miner in charge to instruct them to give warning before firing the blast. In other words, the word "further," used as it is, makes the duty to give warning a personal duty of the miner in charge. This, in our opinion, is what the Legislators intended, and this is the common sense of the matter, we verily believe. If this construction is incorrect, then the use of the word "further" is entirely superfluous, but we cannot believe that the Legislature dropped the word into the paragraph by chance. In construing the paragraph the word must be given its ordinary and reasonable meaning, and, given that meaning, it certainly can reasonably be held that the duty was the personal obligation of the miner in charge, and not a duty of the Mining Company, as stated by the Court to be the law in its instructions.

Now, if we have established that the duty mentioned is personal with the miner in charge, then the instruction complained of must be erroneous and a prejudicial error, for which the cause should be remanded for a new trial. The instruction states that to be the law which is not the law, and in such an unqualified way that the Mining Company is deprived of any or all defenses it might have because of a delinquent servant, or for any other reason recognized in the law.

If we are correct in our contention that the duty to give this warning devolved upon the servant and not upon the master, then we would have been entitled to have the questions of fact submitted to the Jury—first, as to whether or not the servant did violate the statute, and, second, was he acting within the scope of his employment when he so violated the statute. (Knight v. Towles, 62 N. W., 964.)

It must be conceded that if the duty to give the warning was imposed by the statute upon the servant and not upon the company, then, in such an instance, we would not be responsible for the failure of the servant to give warning if the servant was not acting with in the scope of his employment at the time he should have given the warning.

Meecham on Agency, paragraph 745.
Osborne v. McMaster, 41 N. W. 543.
George v. Goeby, 128 Mass. 289.
26 Cyc. 1533. Note 96, 97.
Conder v. Griffith, 111 N. E. 816.

The assumption on the part of the Trial Court that the statutory duty was imposed upon the employer

rather than upon the employee took away from the consideration of the Jury the question of fact as to whether or not the servant violated the statute, and also as to whether or not, if he so violated the statute, he was acting within the scope of his employment at the time he did so.

Even if the duty be found to rest upon the Mining Company, the instruction is nevertheless erroneous and prejudicial eror for another reason, namely, because it is too arbitrary and unqualified in defining the negligence arising from the non-performance of the duty in question. We think the instruction should have stated that the failure to warn, as required by the statute, was not such negligence in itself as to make the Mining Company liable, but was evidence of negligence, or, in the light most favorable to the appellee, *prima facie* evidence of neglicence on the part of the Mining Company. There is a great deal of authority to the effect that in an action brought to recover damages for an injury sustained by reason of the employer's failure to perform a statutory duty imposed upon him for the benefit of the class of employees to which the injured person belongs, the fact of the duty not having been performed simply constitutes evidence which may be considered by the jury as bearing on the question whether the employer is guilty of actionable negligence.

Armour v. Wanamaker, 202 Fed. 423.

Evans v. American Iron & Tube Co., 42 Fed. 519.

Marino v. Lehmaier, 66 N. E. 572.

Lee v. Sterling Silk Mfg. Co., 101 N. Y. Supp. 78.

Scialo v. Steffens, 94 N. Y. Supp. 305.
Kenyon v. Sanford Mfg. Co., 103 N. Y. Supp. 1053.
Carrigan v. Stillwell, 54 Atl. 389.
Turner v. Boston & M. R. R. Co., 33 N. E. 520.
Berdos v. Tremont & Suffolk Mills, 95 N. E. 876.
Finnegan v. Saml. Winslow Skate Mfg. Co., 76 N. E. 192.
Keenan v. Edison Elec. Illuminating Co., 34 N. E. 366.
Sipes v. Michigan Starch Co., 100 N. W. 447.
Jacobs v. Fuller & Hutsinfuller, 65 N. E. 617.
Kurchers v. Goodville & Co., 67 N. W. 729.
Gearing v. Berkson, 111 N. E. 785.
Amberg v. Kinley, 108 N. E. 830.

The following cases hold that the violation of a statute by a person is only *prima facie* evidence in an action brought by the person injured against the person violating the statute:

Conder v. Griffith, 111 N. E. 816.
Taylor v. Ry. Co., Ohio Cir. Ct. N. S. 199.
Giles v. Diamond State Iron Co., 8 Atl. 368.
True Co. v. Woda, 66 N. E. 369.
Maxwell v. Durkin, 57 N. E. 433.
Acton v. Reed, 93 N. Y. Supp. 911.
B. & O. v. Young, 54 N. E. 791.
Chicago & A. R. Ry. Co. v. Hawley, 26 Ill. App. 351.
Orcutt v. Pacific Coast R. Co., 24 Pac. 661.

There is considerable authority to the effect that a purely penal statute, which provides a specific remedy or punishment, cannot be made the basis for a civil action. This is based on the principle, as stated in Sutherland Statutory Constructions, paragraph 207, that: "When a law imposes a punishment which acts

"upon the offender alone and not as a reparation to the "party injured, and where it is entirely within the dis- "cretion of the law-giver, it will not be presumed that "he intended that it should extend further than is ex- "pressed, and humanity would require that it should not "be so permitted in construction."

Holwerson v. St. Louis & S. Ry. Co., 57 S. W. 770.
Maker v. Slater Mill & Power Co., 23 Atl. 63.
Bremben v. Jones, 30 Atl. 411.
Louisville & N. R. Co. et al. v. Collier, 54 S. W. 980.
Grant v. Slater Mill & Power Co., 14 R. I. 380.

We state the above principle and cite the cases supporting it to further maintain our contention that it was error to charge the Jury that defendant was negligent as a matter of law because the statute is violated, and to support our argument that section 4071, E, was only evidence, or, at the most, *prima facie* evidence, of negligence on appellant's part, if it can be held that negligence can be charged to appellant because of a violation of said section.

Respectfully submitted,
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Dated at Phoenix, Arizona, January 12, 1918.

Service of three copies admitted January 12, 1918.
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